



October 29, 2001

Ms. Paula A. Jones
General Counsel
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207

OR2001-4953

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153932.

The Employees Retirement System of Texas ("ERS") received a request for information relating to the current "State of Texas Employee Pharmaceutical Benefit Plan," including the winning contract and proposal and all unsuccessful proposals submitted. You inform this office that ERS has made available to the requestor documents that have been previously released or that have not been identified as excepted from disclosure. ERS takes no position as to whether the remaining requested information is excepted from disclosure. However, you believe that some of the private parties who submitted this information to ERS may claim that the information is proprietary or confidential. ERS notified the interested private parties of the request for this information and of their right to submit arguments to this office as to why the information should not be released.¹ You also submitted the responsive information that ERS believes may be excepted from disclosure.

Initially, we note that as of the date of this decision, this office had received no correspondence from eight of the private entities that ERS notified, namely National Medical Health Card System, Inc.; Caremark, Inc.; PCS Health Systems, Inc.; Express Scripts, Inc./Value Rx; BlueCross BlueShield of Texas; Eagle Managed Care; MIM Health Plans,

¹ See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under chapter 552 of Government Code in certain circumstances).

Inc.; and Eckerd Health Services. We thus have no basis for concluding that any of the requested information relating to these entities must be withheld from disclosure. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990) (stating that if governmental body takes no position, attorney general will grant exception to disclosure under statutory predecessor to Gov't Code § 552.110(a) if third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Therefore, the requested information that relates to these eight entities must be released.

Next, we note that the requested information relating to Merck-Medco Managed Care, L.L.C. ("Merck-Medco") was the subject of Open Records Letter No. 2001-4296 (2001). Open Records Letter No. 2001-4296 (2001) is now the subject of a pending lawsuit against this office over the release of the requested information relating to Merck-Medco. Accordingly, we have not addressed the arguments that were submitted to this office by Merck-Medco and will allow the trial court to resolve the issue of whether the information relating to Merck-Medco must be released to the requestor.

Lastly, we address the arguments that were submitted to this office by National Prescription Administrators, Inc. ("NPA"). NPA claims exceptions to the disclosure of its information under sections 552.104 and 552.110.² Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 protects the interests of governmental bodies, not those of private parties such as NPA that submit information to governmental bodies. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Furthermore, the protection afforded by section 552.104 generally ends after bidding has been completed and a contract has been awarded. *See* Open Records Decision No. 541 at 4-5 (1990) (discussing statutory predecessor). As ERS does not raise section 552.104, the information at issue may not be withheld from disclosure under this exception.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). NPA claims that specified portions of its proposal are excepted from disclosure under both components of section 552.110.

²We note that NPA claims exceptions to the disclosure of its "NPASelectSM Report," "[a]ll price quotes" and "NPA's Financial Statements." ERS did not submit this information to this office, however, and therefore this ruling does not address that information.

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.³ *See Open Records Decision No. 552 at 5 (1990).*

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that

³The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts, § 757 cmt. b (1939); *see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).*

substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that the release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

NPA asserts that specified portions of its proposal are excepted from disclosure under section 552.110(b). Having considered NPA's arguments, we conclude that section 552.110(b) protects much of the information at issue. We have marked the information that ERS must withhold under section 552.110(b). We also conclude, however, that the remaining information for which NPA claims an exception is not protected under section 552.110(b) or as a trade secret under section 552.110(a). *See also* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing not ordinarily excepted from disclosure under statutory predecessor). Therefore, the remaining information relating to NPA must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

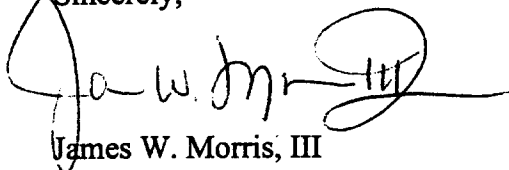
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 153932

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